IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Appeal No. 369 of 1999.

Date of decision: 16.3.2007.

State of H.P. ... Appellant

Versus

Sunil Kumar … Respondent

Coram :

The Hon'ble Mr. Justice V.K. Ahuja, Judge.

Whether approved for reporting?[1] No.

For the appellant: Mr. Ashutosh Burathoki, Additional Advocate General.

For the respondent: Mr. M.L. Brakta, Advocate.

V.K. Ahuja, J.:

This appeal has been filed by the appellant/State of H.P. against the judgment of the Court of learned Judicial Magistrate Ist Class, Court No. 1, Shimla, dated 3.9.1998, vide which the respondent was acquitted of the charge framed against him under Section 61(i)(a) of Punjab Excise Act as applicable to the State of Himachal Pradesh (hereinafter referred to as 'said Act').

A notice of the appeal was issued to the respondent. I have heard Mr. Ashutosh Burathoki, learned Additional Advocate General, for the appellant and Mr. M.L. Brakta, Advocate, learned counsel for the respondent and have gone through the record.

The submissions of the learned Additional Advocate General for the appellant were that the learned trial Court had wrongly acquitted the respondent mainly on the ground that no independent

[1]Whether reporters of Local Papers may be allowed to see the judgment? Yes.

witnesses were associated at the time of the search as well as on the ground that there are some contradictions in the statements of the official witnesses examined by the prosecution. Thus it was submitted that the findings are perverse and as such, are liable to be reversed.

On the other hand, the learned counsel for the respondent had supported the impugned judgment for the reasons given therein supplementing it by the submission that the mandatory provisions of Section 100(4) Cr.P.C. were not complied with and in view of the contradictions in the testimony of the witnesses, the learned trial Court had rightly acquitted the respondent and those findings cannot be said to be perverse so as to be reversed.

On a perusal of the evidence led by the prosecution it is clear that the case of the prosecution was that on 11.1.1991 at about 7.00AM, PW-5 Chander Shekhar, S.H.O. was present at Kainth-Ka-Jubbar along with PW-1 Ram Krishan, constable, PW-2 Dinesh Kumar, constable and PW-4 Rajender Singh, S.I. The case of the prosecution is that they were present for patrolling when a Maruti Van bearing No. HIS-3508 came there and the vehicle driver tried to run over the police party. Accordingly, a case under Section 307 I.P.C. was registered on the complaint of PW-5 Chander Shekhar, S.H.O. at 7.00AM, after one hour he recovered in all 180 bottles of illicit liquor without any permit from the van. The said liquor was taken into possession. Samples were taken as per procedure and on completion of the investigation and on receipt of the report of the Chemical Analyst, the challan was filed before the learned trial Court who tried the respondent as detailed above resulting in his acquittal.

The learned trial Court had mainly referred to the testimony of official witnesses and there were contradictions in regard to the presence of independent witnesses and whether these could be

associated at that time or not. PW-1 Ram Krishan, constable and a member of the raiding party has stated that on the both sides of the road at the spot there are houses and one office of the electricity. He clearly stated that persons were present there and 3-4 vehicles also crossed but none was joined from the persons present there at that time. He stated that he cannot say if the S.H.O. had intentionally not associated any independent witnesses.

PW-2 Dinesh Kumar, constable has stated that they formed the raiding party on way but no respectable persons were joined and he stated that there were no houses nearby. He denied his knowledge in case a Patwarkhana is there near the spot. He denied that there were houses but intentionally no witnesses were joined from there. He denied if any bus crossed at that time. His statement is contradictory to the statement of PW-1 Ram Krishan as discussed above.

PW-4 Rajender Singh, S.I. has stated that there are residential houses near the place of recovery but none was called from those houses. PW-5 Chander Shekhar, S.H.O. has stated that they had not called independent witnesses to the spot. He denied his knowledge in case there are houses near the place of recovery. He stated that no vehicle or persons crossed from there at that time, which is contrary to the version given by other witnesses.

Thus, there were contradictions in regard to the fact as to whether persons were available and could have been associated or not, but it is clear that there are houses and persons were available and two witnesses could have been associated from those houses or the persons who crossed the place at that time. The vehicle was stopped at 7.00 AM, while the recovery was effected at 8.00 A.M. and there was sufficient time for the police to have associated two independent witnesses as required under Section 100(4) Cr.P.C. The learned counsel for the

respondent had drawn my attention to the provisions of Section 2(P) of Cr.P.C. which provides that the word 'place' includes a house, building, tent, vehicle and vessel. It is, therefore, clear that when the search of the vehicle was to be conducted, the provisions of Section 100(4) Cr.P.C. in regard to joining of two independent witnesses were required to be complied with. According to law, in case Investigating Officer is not able to comply with the mandatory provisions of Section 100(4) Cr.P.C.,he has to assign the reasons which can be considered by the Court as to whether these are sufficient or not. However, in the present case inspite of availability of persons at that time, the mandatory provisions of Section 100(4) Cr.P.C. were not complied with by the Investigating Officer and he did not offer any explanation for non-compliance of these provisions. In the absence of non-compliance of mandatory provisions, the guilt of the accused/respondent could not have been said to be established beyond any reasonable doubt and the learned trial Court had rightly acquitted the respondents mainly on the ground of non-compliance of these provisions as well as in view of the contradictions. Those findings cannot be said to be perverse or not sustainable in the eyes of law calling for interference by this Court and as such, those findings are liable to be affirmed.

In view of the above discussion, the appeal filed by the appellant/State of H.P. is dismissed accordingly and the findings recorded by the learned trial Court stands affirmed. Bail bonds furnished by the accused/appellant stand discharged forthwith. A copy of the judgment along with record be sent to the concerned Court.

(V.K. Ahuja),
Judge

March 16, 2007
(BSS)